CORRECTED COPY

Office-Supreme Court, U.S.
FILED
DEC 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-754
IN THE

Supreme Court of the United States

October Term, 1983

JANICE MCKAY, Executrix of the Estate of LT. CDR. MALCOLM MCKAY, Deceased, MARIE CARSON, Administratrix of the Estate of LT. FRANK J. CARSON, deceased,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION, INC., a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT ROCKWELL INTERNATIONAL CORPORATION IN OPPOSITION.

ROBERT FORGNONE,
(Counsel of Record),
SCOTT E. WOOD,
MICHAEL T. WILLIAMS,
GIBSON, DUNN & CRUTCHER,
333 South Grand Avenue,
Los Angeles, Calif. 90071,
(213) 229-7000,
GARRETT J. FITZPATRICK,
MENDES & MOUNT,
Three Park Avenue,
New York, New York 10016,
(212) 683-2400,
Attorneys for Respondent, Rockwell International Corporation.

December, 1983

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Whether *McKay v. Rockwell Intern. Corp.*, 704 F.2d 444 (9th Cir. 1983) is "ripe" for consideration by this Court given the fact that no final judgment exists in said action and the fact that the Ninth Circuit has remanded the case to the District Court for further findings?
2. Was the Ninth Circuit correct in holding that a supplier of military equipment, such as the escape system of a supersonic reconnaissance aircraft, may not be held strictly liable for defects in the *design* of the equipment where, the supplier supplied equipment in conformance with reasonably detailed specifications promulgated or approved by the Government, where the Government has granted itself immunity from liability and where there is no evidence that the supplier withheld from the Government information known to it, but not the Government, about dangers in the equipment or errors in the specifications?*

---

*Pursuant to Supreme Court Rule 28.1, Rockwell International Corporation ("Rockwell") sets forth its parent companies, subsidiaries, and affiliates in Appendix A to this Opposition.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Statement of the Case	1
Factual Background	1
The Escape System	2
The Design Process	3
The Opinions Below	4
Reasons for Denying the Writ	8
I.	
Review by Certiorari at This Time Would Be Premature in That There Is No Final Judgment in This Action and the Ninth Circuit's Remand of This Case to the District Court Compels the Conclusion That the Case Is Not "Ripe" for Determination by This Court	8
II.	
The Ninth Circuit Was Correct in Holding That a Military Contractor Is Not Strictly Liable for Design Defects in Military Equipment Designed in Accordance With Reasonably Detailed Specifications Set or Approved by the United States Government, Moreover, Said Opinion Is Not in Conflict With Any Opinion of This Court or of Any Circuit Court	11
A. The Ninth Circuit's Opinion Does Not Represent a Departure From nor Is It in Conflict With Pre-Existing Case Law	13

Page

B. The Government Contractor Defense Is Applicable to Military Contractors and Is Well Recognized, the Opinion Below Does Not Change the Essential Elements of That Defense nor Does It Make the Defense Universally Applicable 14

C. The Ninth Circuit Correctly Recognized That It Was Not the Province of the Judicial System to, Through Tort Principles, Involve Itself in the Design of Military Products 16

Conclusion 18

Appendix A. Current Subsidiaries and Affiliates of Rockwell International Corporation ..... App. p. 1

TABLE OF AUTHORITIES

Cases	Page
Agent Orange Product Liability Litigation, In re, 534 F.Supp. 1046 (E.D.N.Y. 1982)	14, 17
American Constr. Co. v. Jacksonville, T & K.R. Co., 148 U.S. 372, 13 S. Ct. 758, 37 L. Ed. 486 (1982)	9
Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961)	13, 14
Brotherhood of Locomotive Firemen & Engineers v. Bangor A. R. Co., 389 U.S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967)	10
Catlin v. United States, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1921)	9
Cobbledick v. United States, 309 U.S. 323, 60 S. Ct. 540, 84 L. Ed. 783 (1939)	10
Collins v. Miller, 252 U.S. 364, 40 S. Ct. 347, 64 L. Ed. 616 (1919)	9
Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 785 (1976)	10
Foster v. Day & Zimmermann, 502 F.2d 867 (5th Cir. 1974)	13
Gulf Refinery Co. v. United States, 269 U.S. 125, 46 S. Ct. 52, 70 L. Ed. 198 (1924)	9
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 36 S. Ct. 269, 60 L. Ed. 629 (1916)	10
Heike v. United States, 217 U.S. 423, 30 S. Ct. 539, 54 L. Ed. 821 (1910)	9
Jennings v. Goodyear Air Corp., 227 F. Supp. 246 (D. Del. 1964)	13
John Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 42 S. Ct. 196, 66 L. Ed. 475 (1921)	10

Page

Littlehale v. E. I. Dupont de Nemours & Co., 268 F. Supp. 791 (S.D.N.Y. 1966), aff'd 380 F.2d 274 (2d Cir. 1967) 14

Magnum Import Co. v. Coty, 262 U.S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1923) 12

Martinez v. International Banking Corp., 220 U.S. 214, 31 S. Ct. 408, 55 L. Ed. 438 (1910) 9

McKay v. Rockwell Intern. Corp., 704 F.2d 444 (9th Cir. 1983) ..... i, 1, 2, 4, 6, 7, 15, 16

Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964) 13

North American Aviation, Inc. v. Hughes, 247 F.2d 517 (1st Cir. 1957) 13

Oneida Nav. Corp. v. Job (W. & S.) & Co., 252 U.S. 521, 40 S. Ct. 357, 64 L. Ed. 697 (1919) 9

Quadrini v. Sikorsky Aircraft Division, United Aircraft Corporation, 425 F.Supp. 81 (D. Conn. 1977) 13

Renner v. Rockwell International Corp., 403 F.Supp. 849 (C.D. Cal. 1975), vacated, 587 F.2d 1030 (9th Cir. 1978) 14

Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (1976), aff'd, 154 N.J. Super. 407, 381 A.2d 805 (1977), cert. denied, 75 N.J. 616, 384 A.2d 846 (1978) 15

Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1977) 6, 13, 14

Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969) 13

Yersley v. W.A. Ross Construction Co., 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940) 14

Page

Youngstown Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 26 A.L.R. 2d 1378 (1952) 9, 10

Rules

Rules of the Supreme Court of the United States (1980) Rule 17 12

Rules of the Supreme Court of the United States (1980) Rule 17(a) 11

Rules of the Supreme Court of the United States, Rule 28.1 i

Textbooks

Restatement of Torts 2d, Sec. 402A 5, 6

Stern & Gressman, Supreme Court Practice (5th Ed. 1978) Sec. 4.19 10

No. 83-754

IN THE

Supreme Court of the United States

October Term, 1983

JANICE MCKAY, Executrix of the Estate of LT. CDR. MALCOLM MCKAY, Deceased, MARIE CARSON, Administratrix of the Estate of LT. FRANK J. CARSON, deceased,

Petitioners,

vs.

ROCKWELL INTERNATIONAL CORPORATION, INC., a Delaware corporation,

Respondent.

BRIEF OF RESPONDENT ROCKWELL INTERNATIONAL CORPORATION IN OPPOSITION.

OPINIONS BELOW.

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *McKay v. Rockwell Intern. Corp.*, 704 F.2d 444 (9th Cir. 1983).

STATEMENT OF THE CASE.

Factual Background.

In each of the consolidated wrongful death cases tried below, plaintiffs' decedents lost their lives during attempted escapes from the crippled and out of control RA-5C Vigilante aircraft which they were piloting on the dates in question. By way of background, the RA-5C is a carrier-based

twin-engine supersonic jet aircraft originally designed in the 1950s. At that time the aircraft's design was on the fringe of the then known technology. The aircraft was capable of carrying conventional and nuclear weapons and had a range sufficient to allow it to reach major hostile inland targets after being launched from an aircraft carrier.

In 1961 and 1962 production models of the aircraft were converted to high-speed high-altitude reconnaissance aircraft. The reconnaissance version of the aircraft began duty with the United States Navy starting in 1962. It was thereafter carrier-deployed throughout the world and saw significant combat duty in Vietnam.

In the two consolidated actions tried below it was uncontested that the RA-5Cs involved went out of control during the flights in question, resulting in a proper decision of plaintiffs' decedents to evacuate the aircraft they were piloting. On both of the flights in question the decedents and the rear-seat navigators of the respective RA-5Cs ejected from the aircraft utilizing the aircraft's HS-1A escape system. In both instances the navigators survived the escape with relatively minor and nondisabling injuries while plaintiffs' decedents were either incapacitated or fatally injured during the attempted escapes. (704 F.2d at 446).

The Escape System.

The HS-1A escape system at issue here is a later modification of the HS-1 escape system originally supplied with RA-5C aircraft. However, with the exception of changes not relevant to the opinions below the HS-1A system functioned identically to the HS-1 system during high-speed escapes such as occurred here. [R.T. p. 1372].

The HS-1 escape system developed in the mid-1950s was one of the first fully automatic escape systems developed for and by the United States Navy. This escape system saved

the lives of many aviators who otherwise would surely have perished. Overall, the high-speed (over 300 knots) survival rate for the HS-1 and HS-1A escape system was 90% including escapes initiated at speeds in excess of the speed of sound. [R.T. 1346, Ex. FM]. In late 1968, subsequent to many high-speed escapes utilizing the HS-1 system, the Naval Air Systems Command sent Rockwell a letter requesting an update of the HS-1 escape system.

> "Request contractor be instructed to submit comments earliest on feasibility in program to extend low-speed capability of subject system to the O-O . . .
>
> Present ejection seat is extremely reliable within the designed envelope. Any modification must not compromise this reliability. Improvement to the subject system should incorporate currently Navy qualified components/sub-assemblies as much as possible to eliminate development/qualification costs and reduce logistic and training problems." (Exhibit HF).

The Design Process.

The first step in the design process of a military aircraft and its subsystems is the submission of design proposals which comply with requirements of the general government specification for military aircraft. This specification, general in some areas and specific in others, encompasses design parameters for every significant feature of an aircraft. A process of design "negotiation" then ensues where the military engineers and the engineers of the contractor agree upon the parameters of the subject design. The product of this design negotiation is the final specifications relating to the specific aircraft systems to be produced. This specification is sometimes drafted on the contractor's stationery and at other times the specification is published as a government document. Nevertheless the final design is a merging of the design principles negotiated in the design meetings

between the military and its contractor and incorporates thousands of subspecifications agreed upon and is a joint product of the military and the contractor. [R.T. 1486, 1488, 1513, 1514].

The design of the HS-1/HS-1A escape system was developed in the manner described. Every aspect of the system's design and performance was the subject of joint Navy/Rockwell discussions during development of the system. While it is true that from a contractual standpoint Rockwell was actually assigned the responsibility of creating a design concept from the negotiated specifications, it was equally clear that the Navy participated and was responsible for the ultimate development of the system. [R.T. 1302, 1486, 1487].

The testing of the escape system, both from prototype testing and full system testing, was done pursuant to agreed specifications and was subject to the review and final approval of the Navy. As a result of this process, a decision was ultimately made by the Navy that the escape system possessed a design and performance which was acceptable to it. [R.T. 1487].

The Opinions Below.

Notwithstanding the facts stated above, the District Court found Rockwell subject to liability for an alleged defective design of an ejection system which before the deaths of plaintiffs' decedents was characterized by the United States Navy as "extremely reliable", which was after the subject accident, "exonerated as the cause of the deaths" and, which the Navy pronounced as "safe for flight" after the accidents in question. (704 F.2d at 455). Despite these pronouncements by the United States Navy and despite the technologically complex design of the subject escape system, the District Court chose to test the propriety of the

design under ordinary consumer product standards and in effect ordered the United States Navy and Rockwell to cease usage of the safety system, holding that such a product should be "withdrawn from the marketplace." (Petition, App. A-23).

The District Court noted:

> "Everyone connected with the design of the HS-1A system knew of the dangers of introducing an airman into forceful wind streams at high altitudes and of the compelling importance of creating such seat stability as to protect the human body from the jerking which would otherwise arise from such an introduction. The designer must accept the responsibility of this difficult task when it undertakes to market a product of this unique character." (Petition, App. A-23).

After citing the text of the Restatement of Torts 2d, § 402A, the District Court noted:

> "The evidence shows and the Court finds that the HS-1A ejection system was sold in a condition unreasonably dangerous to the user." (Petition, App. A-26).

On appeal the Ninth Circuit reversed and remanded. It noted:

> "[T]o hold military suppliers liable for defective designs where the United States set or approved the design specifications would thrust the judiciary into the making of military decisions. Although judges must decide cases arising from fields of endeavor of which they know little, their otherwise omnicompetence confronts its limits in military matters. At this point it must be acknowledged that separation of powers becomes a proper concern [citations omitted]. Trials on design defects where government specifications are at issue would 'involve second-guessing military orders, it would often require members of the armed services to testify in court as to each others' decisions and actions.'

> . . . [I]t should [also] be noted that in setting specifications for military equipment the United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those which would be acceptable for ordinary consumers goods." (704 F.2d at 449-450).

The Ninth Circuit held that a supplier of military equipment is not subject to § 402A liability for a design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about errors in the government specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States. (704 F.2d at 451).

However, while the Ninth Circuit noted that Rockwell should be relieved of liability in this action if the United States approved or set reasonably detailed specifications for the HS-1A escape system, it refused to reverse the District Court and instead *remanded for further proceedings* noting:

> "The present record, however, does not permit us to say with assurance that the United States set or approved reasonably detailed specifications for the HS-1A system. On the one hand, Rockwell alleges that the United States was deeply involved in the process of designing and approving the system. On the other hand, plaintiffs-appellants contend that the United States did little more than to send Rockwell a letter asking them to come up with a new ejection system and agreed to purchase Rockwell's completed design.
>
> "We remand these cases to the District Court to determine whether the United States set or approved reasonably detailed specifications for the HS-1A ejec-

tion system. If the District Court finds that the involvement of the United States was limited in the manner plaintiffs-appellants assert — that is, if the United States neither set specifications for the system (other than general outlines of what type of system it required) nor approved Rockwell's final reasonably detailed specifications (by examining and agreeing to a detailed description of the workings of the system) — then Rockwell is subject to strict liability of the rule set forth in § 402A. We note that Rockwell, the supplier, has the burden of proving by a preponderance of the evidence that the United States established, or approved, reasonably precise specifications for the ejection system." (704 F.2d at 453).

On August 5, 1983 plaintiffs' motion to stay the Ninth Circuit's mandate so as to permit plaintiffs to file a Writ of Certiorari in the United States Supreme Court was denied and the Circuit's mandate issued on that date. This Petition followed.

REASONS FOR DENYING THE WRIT.

The decision of the Court of Appeals is correct. It conflicts with no decision of this Court or any other court of appeals. For these reasons alone, the Court should deny the Writ.

Furthermore, this action is not "ripe" for consideration by this Court. The Court of Appeals has reversed the District Court's judgment in favor of plaintiffs and remanded the matter for further proceedings consistent with its opinion. The mandate of the Court of Appeals does not require that the District Court enter a new and different judgment nor does it require a retrial of the entire matter. Rather, it orders the District Court to make additional factual determinations relating to Rockwell's government contractor's defense. It will only be after the District Court proceedings on remand that it will be determinable whether or not the plaintiffs are "aggrieved" parties as that term has been historically construed. Under such circumstances, the present exercise of this Court's discretionary jurisdiction would be premature.

I.

REVIEW BY CERTIORARI AT THIS TIME WOULD BE PREMATURE IN THAT THERE IS NO FINAL JUDGMENT IN THIS ACTION AND THE NINTH CIRCUIT'S REMAND OF THIS CASE TO THE DISTRICT COURT COMPELS THE CONCLUSION THAT THE CASE IS NOT "RIPE" FOR DETERMINATION BY THIS COURT.

It has been consistently held that this Court's appellate jurisdiction extends only to *final judgments* and that such a limitation on jurisdiction is necessary to discourage the piecemeal review of cases and controversies. This Court has noted that "the foundation upon which rests the doctrine which, as a general rule, limits the appellate jurisdiction of this court to final judgments, is that cases should not be brought here by piecemeal through the medium of succes-

sive appeals." *Martinez v. International Banking Corp.*, 220 U.S. 214, 223-224, 31 S. Ct. 408, 55 L. Ed. 438, 443 (1910). This view has been echoed in numerous opinions of this Court. *E.g., Catlin v. United States*, 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1921); *Oneida Nav. Corp. v. Job (W. & S.) & Co.* 252 U.S. 521, 40 S. Ct. 357, 64 L. Ed. 697 (1919); *Collins v. Miller*, 252 U.S. 364, 40 S. Ct. 347, 64 L. Ed. 616 (1919).

In the instant action the Ninth Circuit has *remanded* the case to the District Court to conduct such *further proceedings* as are necessary in order to arrive at certain factual determinations designated by the Ninth Circuit. Thereafter the District Court is to enter judgment for Plaintiff or Defendant as those findings dictate.

> "The general rule established by many decisions, of which *Haseltine v. Central Nat. Bank*, 183 U.S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49, is an example, is that the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity of the opinion of the court ordinarily is not final." *Gulf Refining Co. v. United States*, 269 U.S. 125, 135, 46 S. Ct. 52, 70 L. Ed. 195, 198 (1924).

In *Heike v. United States*, 217 U.S. 423, 30 S. Ct. 539, 54 L. Ed. 821 (1910), it was held that a decree is final for purposes of appeal to the United States Supreme Court when it terminates litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

These principles with rare exceptions have been employed by this Court in determining whether or not to grant certiorari in a given case. *E.g., American Constr. Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384, 13 S. Ct. 758, 37 L. Ed. 486 (1892); *Youngstown Co. v. Sawyer*, 343 U.S.

579, 584-585, 72 S. Ct. 863, 96 L. Ed. 1153, 26 A.L.R. 2d 1378, (1952); *Cobbledick v. United States*, 309 U.S. 323, 324-325, 60 S. Ct. 540, 84 L. Ed. 783 (1939); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258, 36 S. Ct. 269, 60 L. Ed. 629 (1916); *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 42 S. Ct. 196, 66 L. Ed. 475 (1921); Stern & Gressman, *Supreme Court Practice* (5th Ed. 1978) § 4.19.[1] As this Court noted in *Brotherhood of Locomotive Firemen & Engineers v. Bangor A. R. Co.*, 389 U.S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967), a case in which the Court of Appeals for the District of Columbia Circuit, while ruling on various legal issues presented, remanded the case to the District Court to consider various other points,

> "Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

In the instant action the Ninth Circuit has asked the District Court to determine whether or not the United State Government set or approved reasonably detailed specifications for the HS-1/HS-1A ecape system. To accomplish this the District Court will consider the trial record and such other evidence as the parties may present to the Court on the subject.

If the District Court determines, as Rockwell submits it should, that the Government set or approved reasonably detailed specifications for the HS-1/HS-1A escape system, judgment will be entered for Rockwell. On the other hand, if the District Court decides the issue adversely to Rockwell,

---

[1]See also the dissenting opinion of Mr. Justice Stevens in *Estelle v. Gamble*, 429 U.S. 97, 115, 97 S. Ct. 285, 50 L. Ed. 2d 785 (1976) referring to this Court's "normal practice" of denying review of interlocutory orders by writ of certiorari.

judgment will be entered in plaintiffs' favor. If this occurs the Ninth Circuit will have to consider the matters left undecided in the initial appellate proceedings, *i.e.*, plaintiffs' appeal on damage issues and Rockwell's assignments of error which were rendered moot by the Court's initial opinion. In short, this action has not reached anything close to "final" status. Indeed, it cannot yet be determined whether the plaintiffs are "aggrieved" by the Ninth Circuit's opinion.

Under such circumstances it seems clear that consideration of the matter by this Court at this point in the proceedings would be premature and that at a minimum this Court should defer consideration of this matter until a "final judgment" has been entered. That is the procedure this Court has historically followed and it would seem that there are no compelling reasons for the Court to depart from its "normal practice" in this case.

II.

THE NINTH CIRCUIT WAS CORRECT IN HOLDING THAT A MILITARY CONTRACTOR IS NOT STRICTLY LIABLE FOR DESIGN DEFECTS IN MILITARY EQUIPMENT DESIGNED IN ACCORDANCE WITH REASONABLY DETAILED SPECIFICATIONS SET OR APPROVED BY THE UNITED STATES GOVERNMENT, MOREOVER, SAID OPINION IS NOT IN CONFLICT WITH ANY OPINION OF THIS COURT OR OF ANY CIRCUIT COURT.

Rule 17(a) of the Rules of this Court indicates that this Court will generally *not* review a decision of a Court of Appeals on certiorari unless that court "has rendered a decision in conflict with the decision of another federal court of appeals on the same subject matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise

of this court's power of supervision." [Rule 17, Revised Rules of the Supreme Court of the United States (1980)].

A review of the opinion of the Court of Appeals will reveal that it is not in conflict with any opinion or decision of this Court. Moreover, the plaintiffs have not cited this Court to any opinion of any other court of appeal on the same matter which is in conflict with the Ninth Circuit's opinion.

Indeed, the only complaint that plaintiffs present is that they find the Ninth Circuit opinion a departure for pre-existing case law. While we would not agree with plaintiffs' characterization of the Ninth Circuit's opinion, plaintiffs fail to recognize that the purpose of this Court's discretionary jurisdiction is not to rectify departures from "pre-existing case law." Such a rule would reserve to this court the task of authoring every opinion which advanced the law. Moreover the purpose of certiorari is not to grant the plaintiffs a second hearing on the issues decided by the Ninth Circuit,

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred to this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (*Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 43 S. Ct. 531, 67 L. Ed. 922 (1923).)

In short, plaintiffs' petition merely demonstrates their dissatisfaction with the results and rationale of the decision below. However, their distress and dismay is no basis for the exercise of this Court's discretionary jurisdiction. The limited resources of this Court should not be used to give plaintiffs an appeal by certiorari of the decision below.

A. The Ninth Circuit's Opinion Does Not Represent a Departure From nor Is It in Conflict With Pre-Existing Case Law.

It is as important to recognize what the opinion below does not hold as it is to recognize what it does. The opinion below does not immunize military contractors from liability for injuries or death to servicemen caused by defects in products which they have designed, manufactured or supplied to the military.

The opinion below does not apply to negligence actions which are based upon allegations of negligent design. The opinion below does not apply to actions based in strict liability or negligence for a defectively manufactured product nor does it apply to *all* products which the military purchases. The opinion below does not directly or by implication overrule any of the decisions cited by the plaintiffs at pages 9-12 of their petition. Indeed many of the cases cited by plaintiffs are totally irrelevant to the issues resolved below since they involve *manufacturing* rather than *design* defects. *See, e.g., Foster v. Day & Zimmermann*, 502 F.2d 867 (5th Cir. 1974); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969); *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F.Supp. 447 (S.D.N.Y. 1964).

The balance of plaintiffs' cases are not on point because they represent *negligence* rather than *strict liability* actions; *e.g., Quadrini v. Sikorsky Aircraft Division, United Aircraft Corporation*, 425 F.Supp. 81 (D. Conn. 1977); *Jennings v. Goodyear Air Corp.*, 227 F.Supp. 246 (D. Del. 1964); *North American Aviation, Inc. v. Hughes*, 247 F.2d 517 (1st Cir. 1957); or are cases in which the parties did *not* raise the issues discussed in the opinion below. *See, e.g., Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1977); *Boeing*

Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961); *Renner v. Rockwell International Corp.*, 403 F.Supp. 849 (C.D. Cal. 1975), *vacated*, 587 F.2d 1030 (9th Cir. 1978).

The decision below simply holds that in those situations where the government is immunized from liability as a result of the *Feres/Stencel* doctrine and has set or approved reasonably detailed specifications for a military product it has purchased, a manufacturer is *not* strictly liable for design defects in the product unless the manufacturer (but not the government) was aware of defects in the design or in the specifications. The opinion below is narrowly drawn and applies only in limited circumstances. Despite the petitioners' claims to the contrary, the opinion does not serve to immunize military contractors from liability for design defects. Indeed the opinion does not immunize Rockwell from an adverse verdict in this action.

B. The Government Contractor Defense Is Applicable to Military Contractors and Is Well Recognized, the Opinion Below Does Not Change the Essential Elements of That Defense nor Does It Make the Defense Universally Applicable.

The government contractor defense was first articulated by this Court in *Yersley v. W.A. Ross Construction Co.*, 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940). The defense protects a government contractor from liability for acts done by him while complying with government specifications during execution or performance of a contract with the United States. This defense has been applied to all forms of government contractors including military contractors. *See In Re Agent Orange Product Liability Litigation*, 534 F.Supp. 1046 (E.D.N.Y. 1982); *Littlehale v. E.I. DuPont de Nemours & Co.*, 268 F.Supp. 791 (S.D.N.Y 1966), *aff'd* 380 F.2d 274 (2d Cir. 1967).

The plaintiffs concede the viability of the government contractor defense. Their position below and reasserted here is that,

> "[W]hile conceding that the government contractor defense can apply to military products, plaintiffs-appellants argue that it should not apply to these cases. As they see it, the defense is only available where the specifications in the contract leave no discretion to the supplier in the formulation of the products design." (704 F.2d at 450).

In discussing the government contractor defense herein Petitioners concede that it would be unfair to impose liability on a manufacturer where the manufacturer strictly complied with government specifications in manufacturing the subject product. (Petition at pp. 12-13)

The opinion below simply carries the compulsion element to situations not considered in the cases cited by plaintiffs. In those situations where, as a result of collaboration over the design of a technologically advanced military product, the product is designed and manufactured to reasonably detailed specifications set or approved by the government, *McKay* holds that the manufacturer will not be strictly liable to a serviceman who is injured while using the product if the contractor was unaware of any defect or danger in the product or the specifications. *McKay* recognized that a manufacturer under such circumstances is as compelled to produce the product in accordance with the agreed design specifications as was the Ford Motor Company in *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

When the contractors duty to comply with specifications is coupled with the recognition that "in setting specifications for military equipment, the United States is required by the

exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods," the wisdom of the Ninth Circuit's opinion is readily apparent. 704 F.2d at 449-450.

C. The Ninth Circuit Correctly Recognized That It Was Not the Province of the Judicial System to, Through Tort Principles, Involve Itself in the Design of Military Products.

It must be recognized that the regulation of military aircraft design is of necessity an area of national rather than judicial concern. National policy with respect to weapons systems must take into account the mission of the aircraft, *i.e.*, whether an increase in some facet of aircraft performance is to be designed into the aircraft regardless of whether it makes a safer aircraft. Material procurement in time of war is a serious consideration. The sophistication of the military maintenance operations must also be considered. If sales to NATO countries, other allies, or a sister service are contemplated, standardization of design must be accomplished and consideration given to mission, material procurement, maintenance, operations and so forth.

To put it simply, if the Navy determines to employ an escape system stabilized by a "drogue chute" with a specific catapult charge, etc., it is not the function of the judicial system to challenge that determination. Not only did the District Court challenge that determination, it actually found that the product "should be withdrawn" from service use. This finding was made despite the conclusion reached by the Navy that the HS-1A was "safe for flight" and its benefits mandated its continued use. [Exhibit 112] Such a finding compelled correction by the Ninth Circuit. That Court properly recognized that the judiciary can not usurp

the Navy's role in determining what products will be used or remain in use.

In *In Re Agent Orange Product Liability Litigation* it is noted:

> "Courts should not require suppliers of ordinance to question the military's needs or specifications for weapons during war time. Whether to use a particular weapon that creates a risk to third parties, whether the risk could be avoided at additional cost, whether the weapons could be made safer if a longer manufacturing time were allowed, indeed, whether the weapon involves any risk at all, are all proper concerns of the military which selects, buys and uses the weapon. But they are not sources of liability which should be thrust upon a supplier, nor are they decisions that are properly made by a court."

In Re Agent Orange Product Liability Litigation, 506 F.Supp. 1046, 1054 (E.D.N.Y. 1982).

The RA-5C's escape system is part of a weapon of war and not a consumer oriented product to which ordinary concepts of design defect can be applied. The policy decisions which are made when establishing the design specifications, the drawings, the mock-ups, are so complex and interwoven that no judicial proceeding can or should attempt to adjudicate the propriety of those decisions.

The Ninth Circuit's opinion properly recognizes that it is not the judiciary's function to involve itself in the design process of a product so sophisticated as the escape system of a military aircraft. Once the Navy has approved reasonably detailed specifications for that escape system, it is not for the courts to permit a collateral attack upon the Navy's determination, and it is for the courts to apply the government contractor defense in the manufacturer's favor.

CONCLUSION.

We submit that the decision of the Court of the Appeals below is correct. It establishes a limitation on the design liability of military contractors while not immunizing such contractors from liability for defects in military products sold to the United States Government. The decision represents a reasoned approach in a sensitive area of tort law. Despite plaintiff's claims to the contrary, the opinion below does not represent a substantial departure from existing law, but merely represents a clarification of an existing defense which has been historically recognized by this Court.

Moreover, the decision below does not conflict with any opinion of this court nor does it conflict with any opinion of any other court of appeal on the same subject matter. And, since no final judgment has been rendered in this matter, it would be premature for the court to exercise its discretionary jurisdiction. In due course, the District Court will enter a judgment in this matter which will be affirmed by the Court of Appeals. It is only when that proces has been completed that plaintiffs' petition will be timely.

For each and all of these reasons we respectfully request that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

December, 1983.

Respectfully submitted,

ROBERT FORGNONE,
(Counsel of Record),
SCOTT E. WOOD,
MICHAEL T. WILLIAMS,
GIBSON, DUNN & CRUTCHER,
and
GARRETT J. FITZPATRICK,
MENDES & MOUNT,
Attorneys for Respondent,
Rockwell International Corporation.

APPENDIX A.

Current Subsidiaries and Affiliates of Rockwell International Corporation.

A.J. Sage and Co., Pty. Limited (Australia)
Amforge, Inc. (Illinois)
Arpel, S.A. (France)
Atomics International, Inc. (Delaware)
Audco-Rockwell Italiana S.R.L. (Italy)
Automotive Axles Limited (India)
Autonetics, S.A. (Mexico)
Autonetics, Inc. (Delaware)

Braseixos S/A (Brazil)
Brasprenas S/A (Brazil)

Camden Investment Trust, Limited (England)
Collins International Service Company (Texas)
Collins Radio Company (Iowa)
Collins Radio Company of Japan, Ltd. (Japan)
Collins Radio Constructors, Inc. (Texas)
Collins Systems International Inc. (Delaware)
Compagnie Industrielle de Mecanismes, S.A. (France)
Componentes Automotrices Rockwell-Standard y Compania Limitada (Chile)
Constantine Insurance Company, Ltd. (Bermuda)

Dina Rockwell Nacional S.A. (Mexico)
Draper Americas, Inc. (Massachusetts)

Electronic Fabriek N.V. (The Netherlands Antilles)
Europlastique S.A. (France)

Flexible, Inc. (Delaware)

Hills-McCanna Company (Delaware)

Ikegai-Goss Co. Ltd. (Japan)
Industrias Erlo, S.A. de C.V. (Mexico)
Industrias Teluq, S.A. (Spain)

Maine Electronics, Inc. (Delaware)
Manufacturers Leasing Associates XXXV (Maryland)
Metalurgica Carabobo, S.A. (''Metalcar'') (Venezuela)
MGD Graphic Systems, Inc. (Switzerland)
Moligal Produtors de Assentos de Automovel, Limitada (Portugal)
M.P. O'Rourke Pty., Limited (Australia)

Narland Corporation (Delaware)
North American Aviation, Inc. (Delaware)
North American Rockwell Corporation (Delaware)
Nuad Corporation (Delaware)

PHI Magnetronics Limited (England)
Press Kogyo-Rockwell Co., Ltd. (Japan)

Recticon Corporation (Delaware)
Rocketdyne Corporation (Washington, D.C.)
Rocketdyne, Inc. (Delaware)
Rockitt, Ltd. (Oklahoma)
Rockwell Aerospace & Electronics, Inc. (Delaware)
Rockwell (Bermuda) Ltd. (Bermuda)
Rockwell Cerdans, S.A. (Spain)
Rockwell-Collins (Australasia) Pty. Ltd. (Australia)
Rockwell-Collins (Far East) Limited (Hong Kong)
Rockwell-Collins (U.K.) Limited (England)
Rockwell-Collins de Mexico, S.A. (Mexico)
Rockwell-Collins de Nogales, S.A. (Mexico)
Rockwell-Collins France S.A. (France)
Rockwell-Collins G.m.b.H. (Fed. Rep. of Germany)
Rockwell-Collins International, Inc. (Texas)
Rockwell-Collins Italiana S.p.A. (Italy)
Rockwell CVC OMEVI S.p.A.
Rockwell do Brasil Industria e Comercio Ltda. (Brazil)
Rockwell Financial Services Corporation (Delaware)
Rockwell Golde G.m.b.H. (Fed. Rep. of Germany)

Rockwell Golde Italiana S.p.A. (Italy)
Rockwell Graphic Systems Limited (England)
Rockwell Graphic Systems, Inc. (Delaware)
Rockwell International Corporation (Nevada)
Rockwell International Credit Corporation (Delaware)
Rockwell International Finance Corporation (Delaware)
Rockwell International G.m.b.H. (Germany)
Rockwell International Holdings Limited (Delaware)
Rockwell International Limited (England)
Rockwell International Manufacturing Pre. Ltd. (Delaware)
Rockwell International of Canada Ltd. (Canada)
Rockwell International Operations, Inc. (Delaware)
Rockwell International Overseas Capital Corporation (Delaware)
Rockwell International Overseas Corporation (Delaware)
Rockwell International Pension Trustees Limited (England)
Rockwell International S.A. (France)
Rockwell International S.A. (Switzerland)
Rockwell International Sales Corporation (Delaware)
Rockwell International Services Limited (England)
Rockwell International Systems, Inc. (Delaware)
Rockwell International Taiwan Company, Ltd. (China)
Rockwell International Trading Company (Delaware)
Rockwell International Ventures, Inc.
Rockwell Limited (Delaware)
Rockwell Manufacturing Company (Delaware)
Rockwell-Maudslay Limited (England)
Rockwell Mexicana, S.A. (Mexico)
Rockwell-Rimoldi da Amazonia, Industria e Comercio Limitada (Brazil)
Rockwell Rimoldi Espanola S.A. (Spain)
Rockwell Rimoldi France S.A. (France)
Rockwell-Rimoldi G.m.b.H. (Germany)
Rockwell-Rimoldi (Great Britain) Limited (England)

Rockwell-Rimoldi (Ireland) Ltd. (Ireland)
Rockwell-Rimoldi of America, Inc. (New York)
Rockwell-Rimoldi S.p.A. (Italy)
Rockwell Shuttle Operations, Inc.
Rockwell-Standard Corporation (Nevada)
Rockwell-Standard de Venezuela C.A. (Venezuela)
Rockwell Standard of Australia Limited (Australia)
Rockwell Systems Graphiques, S.A. (France)
Rockwell Thompson Limited (England)
Rockwell Transmission Company (Delaware)
Rockwell U.K. Limited (England)
Rockwell Valves International, Inc. (Delaware)
Rockwell Valves Limited (England)
Rockwell Valves S.A. (France)
Rockwell Walther Australia Pty. Ltd. (Australia)
Rockwell Western Trade Corporation (Delaware)
R.O.R. - Sevem S.A. (France)
Rubery Owen-Rockwell (Europa) B.V. (The Netherlands)
Rubery Owen-Rockwell (Manufacturing) Limited (England)
Rubery Owen-Rockwell Limited (England)
Ruedas de Venezuela S.A. (Venezuela)
Sapart, A.G. (Liechtenstein)
Saseb Ag Eschen (Liechtenstein)
SCI Aux Pres Renard (France)
S.C.I. Volta (France)
S.C.I. de Sully sur Loire (France)
Serrature Auto Ferroviarie Edili SpA. (Italy)
Serrature Auto Meridionali Stampi Attrezzature SpA. (Italy)
Setec S.p.A. (Italy)
Silvant Plastics Limited (England)
Smith-Blair Inc. (Ohio)
Societe d'Execution Rationelle de Mecanique Automobile S.a.r.L. (France)
Sumlock Anita Services Limited (England)

Taiwan Axle Company Limited (Republic of China)
Tamet Compania Anonima (Venezuela)
Truflo G.m.b.H. (Germany)
Tyseley Estates Limited (England)

USHA Telehoist, Limited (India)

W.B. Bumpers Limited (England)
Wescom-Alco Associates (Illinois)
Wescom, Inc. (Illinois)
Wescom Leasing Corporation (Delaware)
Wescom (U.K.) Limited (United Kingdom)
Western INternational Industries (California)
Wilmot Breeden Australia Nominees Pty. Ltd. (Australia)
Wilmot Breeden (Australia) Pty Limited (Australia)
Wilmot Breeden Continental, S.A. (Switzerland)
Wilmot Breeden Employees Trust Limited (England)
Wilmot Breeden Group Properties Limited (England)
Wilmot Breeden (Holdings) Limited (England)
Wilmot Breeden International, Inc. (Michigan)
Wilmot Breeden Limited (England)
Wilmot Breeden (Pressings) Limited (England)